Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

GEORGE A. CASILLAS,

Petitioner,

v.

WARDEN, CALIFORNIA STATE PRISON
AT AVENAL, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether California criminal jury instruction (CAL JIC 2.90) satisfies the mandate of *In Re Winship*, 397 U.S. 358, 364 (1970) in that it fails to require that each and every element of a charged crime must be proven beyond a reasonable doubt?

2. Whether the combined jury instructions given to petitioner's jury established a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the standards of *In Re Winship*, 397 U.S. 358, 364 (1970) and *Victor v. Nebraska*, 511 U.S. 1, 5, 6 (1994)?

3. Whether any harmless error rule can be applied to this case of structural error within the mandate and analysis of *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993)?

4. Whether both the United States Ninth Circuit and the United States District Court erred in their analysis of the jury instructions in this case and the consequences thereof within the criteria required by *In Re Winship*, 397 U.S. 358, 364 (1970) and *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993)?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

George A. Casillas, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the memorandum filed September 2, 2003, rehearing and suggestion for rehearing en banc denied November 20, 2003.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed its unpublished Memorandum on September 2, 2003. This appears as Appendix A, 1-3 to this petition.

On November 20, 2003, the U.S. Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc. A copy of that order appears as Appendix C to this petition.

JURISDICTIONAL GROUNDS

(i.) The United States Court of Appeals for the Ninth Circuit affirmed denial of petitioners 28 U.S. 2254 petition by an unpublished Memorandum filed September 2, 2003. A copy of that Memorandum appears at Appendix A, 1-3.

(ii.) The U.S. Ninth Circuit denied a petition for Rehearing/Suggestion for Rehearing En Banc

on November 20, 2003. A copy of that Order appears at Appendix C.

(iii.) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Casillas was an X-ray technician in a Southern California medical office.

On three separate dates in 1997 he X-rayed a broken bone on the body of a juvenile female patient at the office and it was claimed that he touched this female in a sexual manner.

He was charged with, therefore, three separate violations of Penal Code 288(a) and he was tried thereon. At trial he denied the charges.

He was convicted of only one of the three separate crimes, and that conviction was achieved by a combination of California jury instruction errors and deficiencies that violated the commands of this Court in *In Re Winship*, 397 U.S. 358, 364, in the following aspects:

(a.) Initially it is clear that the California Reasonable Doubt instruction, CAL JIC 2.90 fails, on its face, to satisfy *Winship* as continuously made clear by *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) in its failure to instruct that each element/each fact making up that element must be proven true beyond a reasonable doubt.

(b.) No other place in the jury instructions given in petitioner's case corrected this structural error and other jury instructions cemented this structural error because of the calling of witnesses to old non-charged crimes that testified to other non-charged sexual offenses, and instructions to the use in the jury's evaluation of their testimony to prove elements in the charged crimes.

(c.) As set forth in Appendix B, the U.S. District court narrated the giving of CAL JIC 2.50.1 and 2.50.01 which directed the state trial jury to utilize the testimony to prove the elements of the charged crimes if the jury believed it by a "preponderance" of evidence; as stated, at no time was petitioner's jury instructed that each element of the charged crimes must be proven by the beyond reasonable doubt standard as required by *In Re Winship*, 397 U.S. 358, 364 (1970). See pages B-9 and B-10 for these instructions which created the structural error in this case which requires automatic reversal per *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

(d.) The U.S. District Court noted that a usually sua sponte jury instruction, CAL JIC 2.01, here required to have been given due to the circumstantial evidence of the "other crimes" in California trials, was not given, at Appendix B, pages B-10, 11 (and had this instruction been given it would arguably have possibly nullified the effect of the erroneously deficient under *Winship* CAL JIC 2.50 and 2.50.01).

(e.) On direct appeal, the California State Court of Appeals directed that CAL JIC 2.50.1 erred, and must no longer be given in California, but nonetheless failed to reverse the conviction (See page A-2, Appendix) for this clearly established structural error under *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

(f.) Following the exhausting of state remedies via state habeas corpus with the raising of these structural defects and denials at all

levels of the state system, a petition under 28 U.S.C. 2254 was filed which resulted in the decision appearing in Appendix B, this petition.

(g.) The District Court denied relief on its belief that the decision of this Court in *Neder v. United States*, 527 U.S. 1 (1999) held that the "removal" of "one element" of a criminal charge from the jury's consideration was not a structural defect and could therefore be addressed by a "harmless error" rule; in fact, however, Neder addressed only the issue whether a jury trial was denied to Neder WHEN A FEDERAL JUDGE CONCLUDED THAT THE ELEMENT OF "MATERIALITY" WAS ESTABLISHED TRUE BEYOND A REASONABLE DOUBT AND THUS "REMOVED" THAT ELEMENT FROM THE JURY; AT BAR, ALL ELEMENTS REMAINED FOR THE JURY'S RESOLUTION, but the jury was instructed by instructions that were constitutionally deficient under *In Re Winship*, 397 U.S. 358, 364 (1970), creating structural error as established by *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) and thus the issue before the federal court was "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction on proof insufficient to meet the *Winship* standard," as set forth by this Court in *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

(h.) Finally, in Appendix A, the U.S. Ninth Circuit correctly initially set forth the applicable mandates from this Court, at page A-2 but then embarked on total error in applying both a "harmless error rule" to this case

> of structural error and defect under *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) and then engaging in the prohibited SPECULATION as to what the jury "COULD HAVE DONE," error condemned, as well, by *Sullivan* at 508 U.S. 275, 280.

The U.S. Ninth Circuit failed to recognize that these jury instruction errors, which failed to require reasonable doubt evaluation per *In Re Winship*, 397 U.S. 358, 364 (1970), required automatic reversal.

That Circuit panel did admit that "THE JURY INSTRUCTIONS IN THIS CASE WERE MISLEADING," and "THE JURY COULD HAVE BEEN CONFUSED ON THE BURDEN REQUIRED FOR THE SPECIFIC INTENT ELEMENT," and "THE STATE COURT THUS UNREASONABLY APPLIED CLEARLY ESTABLISHED SUPREME COURT PRECEDENT BY GIVING THE FLAWED INSTRUCTION" (Appendix A, page A-2).

Under the mandates of this Honorable Court, defective reasonable doubt instructions cannot by either the "harmless error" rules of *Chapman v. California*, 386 U.S. 18, 24 (1967) or *Brecht v. Abrahamson*, 507 U.S. 619 (1993) save a conviction obtained by defective reasonable doubt instructions, per *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993).

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To resolve whether CALIFORNIA JURY INSTRUCTION 2.90, the California reasonable doubt instruction, satisfies the mandates of

In Re Winship, 397 U.S. 358, 364 (1970) when it fails to require that each element/each fact in a criminal prosecution must be separately proven true beyond a reasonable doubt; see also *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993).

2. To resolve whether any "harmless error" rule can be applied in this case of structural defect/error in view of *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993).

3. To resolve that the erroneous jury instructions allowing evidence of uncharged crimes to be used to establish elements of charged crimes, those charged crimes elements being required to be proven beyond a reasonable doubt but the jury never being so instructed, where here the jury was told the uncharged crime evidence could be used if believed by a preponderance standard, requires automatic reversal as a structural error under *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993).

4. To establish that the giving to the jury of CAL JIC 2.50.1 and 2.50.01 affected every element of the charged crimes and allowed conviction of this petitioner under the reasonable likelihood that the jury understood the totality instructions to allow conviction on proof insufficient to meet the standard under *In Re Winship*, 397 U.S. 358, 364 (1970) and *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

ARGUMENT I

THIS CONVICTION WAS OBTAINED IN VIOLATION OF THE COMMANDS OF *IN RE WINSHIP*, 397 U.S. 358, 364 (1970) AND *VICTOR V. NEBRASKA*, 511 U.S. 1, 5-6 (1994) IN THAT NOT ONLY WAS THE JURY NOT ADVISED THAT THE PROSECUTION MUST BEAR THE BURDEN TO PROVE EVERY ELEMENT/EVERY FACT OF THE CHARGES TRUE BEYOND A REASONABLE DOUBT, BUT THE JURY WAS INSTRUCTED THAT THEY COULD UTILIZE FACTS TO PROVE THESE ELEMENTS TRUE IF BELIEVED BY A PREPONDERANCE OF EVIDENCE. THIS IS A STRUCTURAL ERROR WHICH REQUIRES AUTOMATIC REVERSAL; NO HARMLESS ERROR RULE APPLIES.

This Court has repetitively held that all elements and facts used to establish each element must be proven true beyond a reasonable doubt in any criminal prosecution.

The leading case of *In Re Winship*, 397 U.S. 358, 364 (1970) provides:

> "Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.
>
> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard,

> we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Following *In Re Winship*, supra, *Cage v. Louisiana*, 498 U.S. 39 (1990) provided:

> "In state criminal trial, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

This Court again reaffirmed the *Winship* command in *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993):

> "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 2327, 53 L. Ed. 2d 281 (1977); *Leland v. Oregon*, 343 U.S. 790, 795, 72 S. Ct. 1002, 1005, 96 L. Ed. 1302 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, e.g., *In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); *Cool v. United States*, 409 U.S. 100, 104, 93 S. Ct. 354, 357, 34 L. Ed. 2d 335 (1972) (per curiam). This beyond a reasonable doubt requirement which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings. *Winship*, supra.

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our per curiam opinion in *Cage*, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict. Petitioner's Sixth Amendment right to jury trial was therefore denied."

The reasonable doubt instruction of *Louisiana* was held deficient for other than its correct as to each element being required proving beyond a reasonable doubt enunciation of the *Winship* command.

In *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), the Court, speaking via Justice O'Connor, opened the opinion of the Court with:

> "The government must prove beyond a reasonable doubt every element of a charged offense. *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)."

While *Victor v. Nebraska* struggled only with whether "reasonable doubt" could be defined, it omitted any analysis whether the reasonable doubt instructions of California and Nebraska satisfied the commands of *In Re Winship* and all subsequent cases that reaffirm the command that each element/each fact making up that element must be proven true beyond a reasonable doubt.

It is of historical interest to note that the Louisiana reasonable doubt instruction under attack in both *Cage v. Louisiana*, 498 U.S. 39, 40 (1990) and *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) provided, in part, that:

> "IF YOU ENTERTAIN A REASONABLE DOUBT AS TO ANY FACT OR ELEMENT NECESSARY TO CONSTITUTE THE DEFENDANT'S GUILT, IT IS YOUR DUTY TO GIVE HIM THE BENEFIT OF THAT DOUBT AND RETURN A VERDICT OF NOT GUILTY. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused . . . "

Interestingly, the Nebraska reasonable doubt instruction quoted in *Victor v. Nebraska*, 511 U.S. 1, 18 (1994) provided, in part:

> "At Victor's trial, the judge instructed that "THE BURDEN IS ALWAYS ON THE STATE TO PROVE BEYOND A REASONABLE DOUBT ALL OF THE MATERIAL ELEMENTS OF THE CRIME CHARGED, AND THIS BURDEN NEVER SHIFTS,"

and thus it appears that Nebraska's reasonable doubt instruction contained the required standard from *In Re Winship*, 397 U.S. 358, 364 (1970).

However, the California reasonable doubt instruction, CAL JIC 2.90, is demonstrably deficient, and, in general, no other California Jury Instruction rectifies this error with the exception of CAL JIC 2.01, which normally is a sua sponte obligation of the trial court, and surely should here have been given. (See Appendix B at B-10, B-11 for the 28 U.S.C. 2254 noting of the need to give that instruction, and failure to have it given).

Certiorari should therefore be granted in this case of structural error under *Sullivan v. Louisiana*, 508 U.S. 275-280-281 (1993).

ARGUMENT II

IN ANY ATTACK ON A CRIMINAL REASONABLE DOUBT INSTRUCTION, THE PROPER INQUIRY IS NOT WHETHER THE INSTRUCTION "COULD HAVE" BEEN APPLIED IN AN UNCONSTITUTIONAL MANNER, BUT WHETHER THERE IS A REASONABLE LIKELIHOOD THAT THE JURY DID SO APPLY IT. *VICTOR V. NEBRASKA*, 511, U.S. 1, 6 (1994); *ESTELLE V. MCGUIRE*, 502 U.S. 62, 72 AND N.4 (1991) HERE THE ADMITTEDLY "MISLEADING" INSTRUCTIONS ALLOWED CONVICTION ON STANDARDS FALLING SHORT OF WINSHIP.

In Appendix A the U.S. Court of Appeals in its terse and unpublished Memorandum denying relief in this key structural error case admitted, at A-2:

> THE JURY INSTRUCTIONS IN THIS CASE WERE MISLEADING. Given the inclusion of CAL JIC 2.50.01 and 2.50.1, the latter which the state court found should no longer be given, and the lack of further instructions on the sufficiency of circumstantial evidence to prove specific intent, THE JURY COULD HAVE BEEN CONFUSED ON THE BURDEN REQUIRED FOR THE SPECIFIC INTENT ELEMENT; counsel's arguments and questions asked on juror questionnaires do not suffice to meet the *Winship* standard. THE STATE COURT, THUS, UNREASONABLY APPLIED CLEARLY ESTABLISHED

SUPREME COURT PRECEDENT BY GIVING THE FLAWED INSTRUCTION."

It is, therefore, abundantly clear that the Ninth Circuit has determined that this jury COULD HAVE BEEN CONFUSED ON THE BURDEN REQUIRED FOR THE SPECIFIC INTENT ELEMENT, and thus this conviction runs afoul of *Winship*. Indeed, *Victor v. Nebraska*, 511 U.S. 1, 6 (1994) specifically addresses the inquiry as:

> "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction on proof insufficient to meet the *Winship* standard."

As set forth in Appendix B, the U.S. District Court noted that the jury was told, via CAL JIC 2.50.1 that:

> "Within the meaning of the preceding instructions, the prosecution has the burden of proving by a PREPONDERANCE OF THE EVIDENCE that a defendant committed sexual offenses other than those for which he is on trial. You must not consider this evidence for any purpose unless you find by a PREPONDERANCE OF THE EVIDENCE that a defendant committed the other sexual offenses."

And via CAL JIC 2.50.1 that:

> "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. "Sexual offense" means conduct made criminal by Penal Code Section 288(a) or 243.4(d). The elements of these crimes are set forth elsewhere in these instructions.

If you find that the defendant committed a prior sexual offense, you may, but are not required to:

1. Infer that the defendant had a disposition to commit the same or similar-type sexual offenses. If you find that the defendant had the disposition, you may, but are not required to, INFER THAT HE WAS LIKELY TO COMMIT AND DID COMMIT THE CRIME OR CRIMES OF WHICH HE IS ACCUSED.

2. Determine if this evidence SHOWS THE EXISTENCE OF THE INTENT which is a NECESSARY ELEMENT OF THE CRIMES CHARGED. For the limited purposes for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not permitted to consider this evidence for any other purposes other than those described in this instruction."

Plainly, the specific elements of the actual charges, violations of Penal Code 288(a), were set forth in CAL JIC 10.41, appearing in Appendix B-8, 9 and were:

"In order to prove this crime, each of the following elements must be proved:

1. A person touched the body of a child;

2. The child was under 14 years of age; and

3. The touching was done with the specific intent to arouse, appeal to, or gratify the lust, passing, or sexual desires of that person or child."

Clearly nowhere was petitioner's jury instructed that each and every one of these three elements must be proven true beyond a reasonable doubt, as required by *Winship*, *Sullivan* and *Victor*, but that jury was told that if they believed petitioner had COMMITTED A PRIOR SEXUAL OFFENSE BY A PREPONDERANCE OF EVIDENCE, they could infer that petitioner "WAS LIKELY TO COMMIT AND DID COMMIT THE CRIME OR CRIMES OF WHICH HE IS ACCUSED," and thus APPLY THIS ERRONEOUS LEVEL OF PROOF TO ESTABLISH ALL THREE OF THE ELEMENTS OF THE ACTUAL CHARGES.

Therefore, the erroneous set of instructions taken, in toto, and in internal emphasis with each other, enables the evaluating mind to conclude "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard, creating structural error mandating reversal under *Sullivan v. Louisiana*, 508 U.S. 275, 276-282 (1993).

As the Sullivan Court, speaking via Mr. Justice Scalia, stated:

> " . . . the essential connection to a beyond reasonable doubt factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings."

It is, therefore, inescapable that Certiorari must be granted and further elaborate analysis must emanate from this Honorable Court to rectify the gross errors now existing in the U.S. Ninth Circuit and its District Courts as set forth in Appendices "A" and "B." This is a case of

plain structural error and no harmless error rule can be applied. (See, for this error, page A-3, Appendix).

ARGUMENT III

A FEDERAL CIRCUIT COURT CANNOT SUBSTITUTE ITSELF FOR THE JURY AND EVALUATE THE EVIDENCE AND WRONGLY CONCLUDE "HARMLESS ERROR" IN A CASE OF STRUCTURAL DEFECT DUE TO CONSTITUTIONALLY DEFECTIVE REASONABLE DOUBT INSTRUCTIONS; *SULLIVAN V. LOUISIANA*, 508 U.S. 275, 280 (1993).

The U.S. Ninth Circuit at page A-3 of the Appendix purported to apply, and did apply, a "harmless error rule" in this case of clear structural error, in defiance of this Honorable Court's command in *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993):

> "Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty

> beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. See Yates, supra 500 U.S. at 413-414, 111 S. Ct. at 1898 (SCALIA, J. concurring in part and concurring in judgment). The Sixth Amendment requires more than APPELLATE SPECULATION about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946)."

Worse yet, the Ninth Circuit referenced as its support *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the lesser protection in habeas corpus on "harmless error" after direct appeal, and speculated that "even if none of the testimony of (petitioner's) prior allegedly lewd acts had been admitted, (petitioner) COULD HAVE been convicted based on the testimony of Jane L. alone. . . ."

It is of passing interest that even with the faulty *Winship-Victor-Sullivan* required jury instructions on reasonable doubt, petitioner was convicted of only one of the three charged crimes. (See page B-5, footnote 1: "Petitioner was charged with three section 288(a) violations, but was only convicted of one.") The Ninth Circuit recourse to a "harmless error" analysis simply is grossly erroneous in view of the above commands from *Sullivan v. Louisiana* and Certiorari must be granted to establish, for this petitioner and for all criminal defendant's protection hereafter, in the State of California, a new harmless error rule that complies with *In Re Winship*, 397 U.S. 358, 364 (1970).

ARGUMENT IV

THE U.S. DISTRICT COURT IN ITS DENIAL OF THE 28 U.S.C. 2254 PETITION RESORTED ERRONEOUSLY TO *NEDER V. UNITED STATES*, 527 U.S. 1 (1999), A CASE WHERE EVERY ELEMENT WAS ESTABLISHED TRUE BEYOND A REASONABLE DOUBT AND THE ISSUE WAS ONLY WHETHER THE COURT'S DETERMINATION OF THE ELEMENT OF MATERIALITY, AND ITS SUBSEQUENT REMOVAL FROM THE DETERMINATION OF THAT ELEMENT BY THE JURY, DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY. *NEDER* DOES NOT CONTROL THE ISSUE OF THIS PETITIONER'S CASE, WHERE HERE THE JURY WAS GIVEN DEFECTIVE REASONABLE DOUBT INSTRUCTIONS THAT AFFECTED EVERY ELEMENT OF THE CHARGE.

Neder v. United States, 527 U.S. 1, 8 (1999) reaffirmed that among errors held to be "structural" was that of a defective reasonable doubt instruction, citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

An examination of *Neder* establishes that the sole issue adjudicated therein was whether there was a deprivation of the Sixth Amendment guarantee of trial by jury where the trial judge personally determined the element of "materiality" and in so doing removed it from so finding by the jury. Clearly, however, the trial judge found that element true beyond a reasonable doubt.

Neder, therefore, does not impact on the issues at bar where, as here, the jury was instructed on reasonable doubt instructions that did not pass muster under *In Re Winship*, 397 U.S. 358, 364 (1970) and *Victor v. Nebraska*, 511 U.S. 1, 5 (1994).

As set forth supra in Argument II, the use of CAL JIC 2.50.1 instructed the jury that if they believed true the claimed non-charged prior sexual offenses by the level of *preponderance*, they could:

> 1. Infer that the defendant had a disposition to commit the same or similar type of sexual offenses. IF YOU FIND THAT THE DEFENDANT HAD THE DISPOSITION, YOU MAY, BUT ARE NOT REQUIRED TO, INFER THAT HE WAS LIKELY TO COMMIT AND DID COMMIT THE CRIME OR CRIMES OF WHICH HE IS ACCUSED.

This instruction therefore impacted on all three elements of the charged offenses, under California Penal Code 288(a) and did not restrict scrutiny only to the element of intent.

The element of intent was again subsequently allowed establishment on the defective under Winship standard, because the jury was directed that they could:

> 2. Determine if this evidence shows the existence of the intent which is a necessary element of the crimes charged.

The U.S. District Court in Appendix B claimed that the assailed instructions affected *only one element* of the crime, and only "removed it" from the jury's determination and that the error therefore was not "structural," and could be addressed by a "harmless error" rule, citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Per *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993) this is a structural error not amenable to maintaining this conviction under some "harmless error" rule. (See pages B-4, B-5, Appendix B).

The District Court continued its erroneous evaluation at B-11 thru B-14, claiming "but one element" was affected, noting and admitting that the "burden of proof" was "arguably lowered on one element." (B-12)

Clearly, however, the above assailed state instruction CAL JIC 2.50.1 directed the jury to apply the instruction to "the crime or crimes with which he was charged," and thus, ipso facto, an affect of all three elements since all three elements make up the crime.

The only key issue at bar is that the jury was given Winship-defective reasonable doubt instructions, not the main issue of Neder and the inquiry must be:

> "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard," as required by *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

Under the combined jury instructions here given, and the parallel deficiency in the California reasonable doubt instruction, one must conclude that such a reasonable likelihood did occur.

Certiorari should, therefore, be granted in this clear case of structural error refused reversal by both state and federal courts.

CONCLUSION

In this case of clear structural error based on constitutionally defective reasonable doubt instructions within the commands of *In Re Winship*, 397 U.S. 358, 364 (1970), and all subsequent rulings of this Honorable Court, Certiorari

should be granted to the U.S. Court of Appeals for the Ninth Circuit.

The Circuit Court applied "harmless error" analysis where such analysis is forbidden under *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) and COMMITTED FORBIDDEN SPECULATION on what the jury "COULD HAVE" found even in view of the gross structurally defective "misleading" jury instructions on reasonable doubt.

The State of California must be commanded to revise its reasonable doubt instruction to achieve congruence and compliance with *In Re Winship*, 397 U.S. 358, 364 (1970) and *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), the latter never addressing whether CAL JIC 2.90 complied with the requirement that each element/each fact must be established true beyond a reasonable doubt.

Dated: February 16, 2004, at Santa Ana, Orange County, California 92701.

Respectfully submitted,

ROGER S. HANSON, ESQ.
California Bar 37966
Counsel to Petitioner,
George A. Casillas

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE A. CASILLAS, Petitioner-Appellant, v. WARDEN, of the California State Prison at Avenal, California; PEOPLE OF THE STATE OF CALIFORNIA, by the Attorney General of California, Respondents-Appellees.	No. 02-56444 D.C. No. CV-01-00120-GLT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted August 6, 2003
Pasadena, California

(Filed Sep. 02, 2003)

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

George Casillas appeals the district court's denial of his petition for habeas corpus. We affirm the judgment of the district court.

Because Casilla's petition was filed after April 24, 1996, the amendments to 28 U.S.C. § 2254 under the Antiterrorism and Effective Death Penalty Act apply. *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003)

The due process clause of the fourteenth amendment requires the prosecution to prove beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U.S. 358, 364 (1970); *Carella v. California*, 491 U.S. 263, 265 (1989). The constitution does not require specific words to be used in jury instructions, but does require the instructions as a whole to correctly convey the concept of reasonable doubt to the jury. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). "The constitutional question is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Id.* at 6.

The jury instructions in this case were misleading. given the inclusion of CALJIC 2.50.01 and 2.50.1, the latter which the state court found should no longer be given, and the lack of further instructions on the sufficiency of circumstantial evidence to prove specific intent, the jury could have been confused on the burden required for the specific intent element. Counsels' arguments and questions asked on juror questionnaires do not suffice to meet the *Winship* standard. The state court, thus, unreasonably applied clearly established Supreme Court precedent by giving the flawed instructions.

Harmless error analysis applies, however, as the erroneous instructions did not affect the basic elements of the trial. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993); *Neder v. United States*, 527 U.S. 1, 9-10 (1999). Even if none of the testimony of Casillas's prior allegedly lewd acts had been admitted, Casillas could have been convicted based on the testimony of Jane L. alone. Jane L. testified to three separate instances. On the first, Casillas rubbed his erect penis against her as he reached to adjust the x-ray machine. On the second, she moved her hand away from where he had pressed his erect penis and told her, "you can leave you hand there if you want." On the third, Casillas's zipper and lab coat were open, exposing his penis to her, and he touched her hand with his penis.

The testimony given for the charged acts, by itself, is sufficient to show the specific intent required for conviction under California Penal Code § 288(a), particularly as evidence of an erection has been found to be substantial evidence of specific intent under § 288(a). *See In re Paul C.*, 221 Cal. App. 3d 43, 54 (1990). As any error resulting from the erroneous jury instructions was harmless, the district court's denial of habeas corpus is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

GEORGE A. CASILLAS, Petitioner, v. WARDEN, CALIFORNIA STATE PRISON AT AVENAL, Respondent.	No. SACV-01-120-GLT (JWJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed May 28, 2002)

This Report and Recommendation is submitted to the Honorable Gary L. Taylor, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and dismissed with prejudice.

I.

On June 3, 1997, Petitioner George A. Casillas was convicted in Los Angeles County Superior Court of committing a lewd act upon a child (Cal. Penal Code § 288(a)). (Clerk's Transcript ("CT") 115). The court sentenced Petitioner to six years in state prison. (CT 131-33). The California Court of Appeal affirmed his conviction on October 22, 1998. (Answer, Exh. A). The California Supreme Court denied review on January 13, 1999 (Answer, Exh. C).

After exhausting his remedies in state court, Petitioner filed the instant Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254) in this Court on September 25, 2000. Respondent filed a Motion to Dismiss the Petition as time-barred and procedurally defaulted which the Court denied on February 27, 2001. For the reasons explained below, the Court now recommends that the Petition be denied and dismissed with prejudice on its merits.

II.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. Under the AEDPA, a federal court shall presume that a determination of factual issues made by a state court is correct, and Petitioner has the

burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Supreme Court has explained the standard of review under the AEDPA as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the fact of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Ninth Circuit has held that "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." *Weighall v. Middle*, 215 F.3d 1058, 1062 (9th Cir. 2000).

Under the AEDPA, circuit law "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help [a federal habeas court] determine what law is 'clearly established.'" *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir.), *cert. denied*, 531 U.S. 944, 121 S.Ct. 340, 148 L.Ed.2d 274 (2000) (*quoting Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000)). However, "only the Supreme Court's holdings are binding on the state

courts and only those holdings need be 'reasonably' applied." *Id.*

In reviewing a habeas petition, the Court will examine an explicated California Court of Appeal opinion under the AEDPA where the California Supreme Court opinion denies the same claims without discussion because "where there has been one reasoned state court judgment rejecting a federal claim, [federal habeas courts should presume that] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 2594, 115 L.Ed.2d 706 (1991); *see also Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (noting that habeas courts "look through" unexplained denial by the California Supreme Court to review explicated California Court of Appeal opinion), *cert. denied*, ___ U.S. ___, 122 S.Ct. 324, 151 L.Ed.2d 242 (2001).

In addition, a federal court may not grant a habeas petition even where a constitutional error occurred unless either the error was structural, and therefore not subject to harmless error review, or the error was a harmful trial-type error. Structural errors are those that affect "the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). They are "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards [and affect the] entire conduct of the trial from beginning to end." *Id.*, 499 U.S. at 309. Where a structural error occurs, reversal is automatic. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

Most constitutional errors are trial-type errors, however, and are amenable to harmlessness review. *Fulminante*, 499 U.S. at 306. To determine whether a trial error is harmful and warrants habeas relief, the Court examines whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. On habeas review, the Court must apply the *Brecht* standard regardless of the harmless error test applied by the state courts. *Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir.), *cert. denied*, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed. 536 (2000).

III.

The California Court of Appeal found the following facts in affirming Petitioner's conviction:

> [D]efendant, who was an X-ray technician in the office of Dr. Benjamin Broukhim, committed lewd acts on 12-year-old Jane L. on three separate occasions.[1] Jane L. was being treated for a broken arm. Each time defendant took X-rays of her arm he either rubbed his erect penis against her or exposed himself to her.
>
> At trial, the prosecutor introduced, pursuant to [California Evidence Code] section 1108 and over defendant's objection, testimony from Shinka M. and nine-year-old Mariel H. that they had experienced inappropriate touching while defendant was taking X-rays. Shinka M.

[1] Petitioner was charged with three section 288(a) violations, but was only convicted of one.

> testified defendant had felt her breasts with both hands while taking X-rays of an injury to her chest. Shinka M. also testified that defendant gave her a massage for a chronic back problem. As defendant knelt behind her astraddle her hips, she could feel his erect penis on her buttocks. Mariel H. testified that she had hurt her hand and had a soft cast on it. As defendant X-rayed her hand, he put his penis on her leg and pushed it against her and moved from side to side. His jacket was unbuttoned and his pants were unzipped at the time. On rebuttal, Julissa A. testified that on two or three occasions, defendant offered to give her a massage. When defendant got close to her, she could feel his erection on her lower back.

(Answer, Exh. A, at 27-28).

IV.

Petitioner argues in claims one, two, four and five that the trial court violated his due process rights in instructing the jury on the specific intent required for a conviction under section 288(a). (Petition, at 6(a)-(e); Traverse); Cal. Penal Code § 288(a) ("Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body . . . of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony.").

Specifically, the Court understands Petitioner's arguments, as explained in claims one, two, four and five, to be as follows: The jury heard evidence that Petitioner committed uncharged prior lewd acts. The

jury was instructed that these prior acts need only have been proved by a preponderance. The jury was instructed it could use these prior acts to prove that Petitioner had the requisite specific intent to commit the three charged acts of lewd conduct. The jury was not specifically instructed that every element of the charged crime or every fact necessary to prove his guilt had to be proved beyond a reasonable doubt. Therefore, Petitioner concludes, the jurors must have understood the instructions to mean that they could find Petitioner guilty if they found, by a mere preponderance of the evidence, and not beyond a reasonable doubt, that he possessed the requisite specific intent. (*See e.g.* Petition, at 6(a)-(e); Traverse, at 11). Petitioner cites *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) for the well-recognized proposition that the state must prove every element of the charged offense beyond a reasonable doubt. (*See e.g.* Petition, at 6(a); Traverse, at 2).

The jury in Petitioner's trial was instructed with CALJIC No. 2.90 (state's burden of proof is beyond a reasonable doubt);[2] CALJIC No. 10.41 (elements of a

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[2] The jury was instructed with CALJIC No. 2.90 as follows:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs

(Continued on following page)

section 288(a) violation) and 3.31 (necessity of union between intent and conduct);[3] CALJIC No. 2.50.1 (prior

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> is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(*Reporter's Transcript* ("RT") 451; CT 100).

[3] The jury was instructed with CALJIC No. 10.41 which explained the elements of a section 288(a) violation as follows:

> Defendant is accused in Counts 1, 2 and 3 of the Information of having committed the crime of lewd act with a child in violation of section 288, subdivision (a) of the Penal Code.
>
> Every person who willfully commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the child, is guilty of the crime of committing a lewd or lascivious act upon the body of a child in violation of Penal Code section 288, subdivision (a).
>
> A "lewd or lascivious act" is defined as any touching of the body of a child under the age of 14 years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party.
>
> To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.
>
> The law does not require as an essential element of the crime that the lust, passions, or sexual desires of either of such persons be actually aroused, appealed to, or gratified.
>
> It is no defense to this charge that a child under the age of 14 years may have consented to the alleged lewd or lascivious act.
>
> In order to prove this crime, each of the following elements must be proved.:

(Continued on following page)

lewd acts need only be proved by a preponderance of the evidence) and CALJIC No. 2.50.01 (evidence of prior acts may be used to prove specific intent).[4] the jury was

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1. A person touched the body of a child;

2. The child was under 14 years of age; and

3. The touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child.

(Reporters Transcript ("RT") 452-54; CT 102-03). The jury was further instructed with CALJIC No. 3.31 as follows:

> In the crimes of violating Penal Code sections 243.4(d) and 288(a) there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless the specific intent exists, the crime to which it relates is not committed.
>
> The specific intent required is included in the definitions of these crimes set forth elsewhere in these instructions.

(RT 452; CT 101).

[4] The jury was instructed with CALJIC No. 2.50.1 as follows:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses other than those for which he is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses.

(RT 448; CT 95). The jury was further instructed with CALJIC No. 2.50.01 as follows:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. [¶] "Sexual offense" means conduct made criminal by Penal Code Section 288(a) or 243.4(d). The elements of these crimes are set forth elsewhere in these instructions.

not instructed with CALJIC Nos. 2.01 and. 2.02,[5] which Petitioner argues would have instructed the jurors that

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If you find that the defendant committed a prior sexual offense, you may, but are not required to:

1. Infer that the defendant had a disposition to commit the same or similar-type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.

2. Determine if this evidence shows the existence of the intent which is a necessary element of the crimes charged.

For the limited purposes for which you may consider this evidence, you must weight [sic] it in the same manner as you do all other evidence in this case. [¶] You are not permitted to consider this evidence for any other purposes other than those described in this instruction.

(RT 446-47; CT 94).

[5] CALJIC No. 2.01 provides as follows:

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(Continued on following page)

the facts necessary to prove specific intent, i.e., his prior lewd acts, must have been proved beyond a reasonable doubt. (Petition, at 6(a)-(b); Traverse).

For purposes of this analysis, the Court will assume that Petitioner's due process rights were violated by the jury instructions as they related to the element of specific intent and that the California state courts unreasonably found otherwise under the AEDPA. Nevertheless, Petitioner is not entitled to habeas relief. As noted, habeas relief is not warranted unless a structural or a harmful

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CALJIC No. 2.01 (1996). CALJIC No. 2.02 provides as follows:

> The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act.
>
> However, you may not [find the defendant guilty of the crime charged [in Count[s] ___, ___, ___ and ___], [or] [the crime[s] of ___, ___, ___, which [is a] [are] lesser crime[s]], [or] [find the allegation ___ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other its absence, you must adopt that interpretation which points its absence. If, on the other hand, one interpretation which points its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

CALJIC Nos. 2.01, 2.02 (1996).

trial error occurred in a petitioner's trial. The error claimed by Petitioner was neither, as explained below.

Where a trial court instructs the jury with a defective reasonable doubt instruction as to *all* the elements of the charged crimes, the court has committed a structural error which requires reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In such a case, there has been no guilty verdict because the faulty reasonable doubt jury instruction "vitiates *all* the jury's findings." *Id.*, at 280-81 (emphasis in original). In contrast, jury instructions that improperly remove only one element from the jury's consideration are subject to harmless error analysis because they do not taint the entire guilty verdict. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (examining trial court's error under *Gaudin*, 515 U.S. 506, in removing one element from jury's consideration). The Court in *Neder* distinguished *Sullivan* on the basis that where the jury has received improper instructions on only one element of the charged offense, not *all* of the jury findings are tainted. *Id.*, 527 U.S. at 10-11. Based on the Supreme Court's "settled precedent," jury instructions omitting one element of the offense are error subject to harmless error review. *See id.*, 527 U.S. at 8-15.

Under *Neder*, any error that occurred in Petitioner's trial is subject to harmlessness review. As in *Neder*, the jury in Petitioner's case was properly instructed on the state's burden of proof in general. *See id.*, at 9: (RT 451; CT 100). However, also like in *Neder*, the jury was presumably incorrectly instructed on one element of the charged offense. In *Neder*, the trial court wholly omitted one element from the jury's consideration. In Petitioner's case, the trial court's instructions arguably lowered the burden of proof on one element. Any error in the jury

instructions given at Petitioner's trial did not "vitiate *all* the jury's findings" and therefore, there is a basis on which to conduct harmless error review; no structural error occurred in Petitioner's trial. *Neder*, 527 U.S. 1; *see also Spicer v. Gregoire*, 194 F.3d 1006, 1008-09 (9th Cir. 1999) (applying *Neder* to find that jury instructions arguably shifting burden of proof to defendant on one element of offense constitute harmless error).

Petitioner does not address *Neder*, and instead cites *Harmon v. Marshall*, 69 F.3d 963, 965 (9th Cir. 1995) (per curiam) for the proposition that failure to instruct on one element is structural error. (Traverse, at 23). However, the Ninth Circuit explicitly noted in that case: "[W]e emphasize that this case does not involve the failure to instruct on a single element of an offense, but the failure to instruct on *any* element of a particular offense." *Harmon*, 69 F.3d at 965 (emphasis in original). Nevertheless, the Ninth Circuit in *Harmon* did note that it had previously held, in numerous cases including *Gaudin*, which originated in the Ninth Circuit, that the failure to instruct on one element constituted structural error. *Id.*, at 965-66. This prior Ninth Circuit authority can not control this case after *Neder*, however, which explicitly held that error under *Gaudin* is subject to harmless error review. So too is any error that occurred in Petitioner's trial.

As noted, habeas relief is only warranted where an alleged trial error had a "substantial and injurious effect" on the outcome of the proceedings. *Brecht*, 507 U.S. at 637; *Bains*, 204 F.3d at 976-77. That is not the case here; Petitioner is not correct in his suggestion that the only evidence of his specific intent was that shown through the prior uncharged incidents. (See Traverse, at 28). To the contrary, Jane L. testified regarding the three charged

offenses as follows: Petitioner touched her inappropriately in three instances, during all three instances he had an erection, on the second occasion, she moved her hand away from where he had pressed his erect penis against her and he told her "You can leave your hand there if you want," on the third occasion, his fly and lab coat were open, exposing his penis to her, and during that third incident he touched her bare hand with his exposed penis. (RT 210-19). These circumstances in and of themselves overwhelmingly showed that Petitioner possessed the relevant specific intent to be guilty of a section 288(a) violation. *See* Cal. Penal Code § 288(a); *In re Paul C.*, 221 Cal.App.3d 43, 54 (1990) (evidence that perpetrator had an erection is substantial evidence of requisite intent).

Petitioner's argument is that the trial court lowered the state's burden of proving his intent *based on his prior acts*. Petitioner does not argue that evidence supplied by Jane L. *concerning the charged acts* was subject to any lowered burden and the instructions nowhere suggest it. Given the evidence supplied by Jane L., which was strong evidence of Petitioner's illicit intent towards her, any error in jury instructions concerning Petitioner's intent *as proven by the prior acts* did not have a "substantial and injurious effect" on the outcome of the proceedings. *Brecht*, 507 U.S. at 637; *Bains*, 204 F.3d at 976-77.

V.

In his third claim, and in passing in his first claim, Petitioner contends that CALJIC No. 2.20.1, which

addresses the credibility of child witnesses,[6] violates due process because it doesn't require that the factors regarding a child's credibility be proved beyond a reasonable doubt. (Petition, at 6(b)-(c)). Further, as part of claim one, Petitioner appears to contend that CALJIC No. 2.82, regarding expert witness testimony,[7] violates due process

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[6] CALJIC No. 2.20.1 was read to the jury as follows:

> In evaluating the testimony of a child ten years of age or younger you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.
>
> "Cognitive" means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge.

(RT 442; CT 87).

[7] CALJIC No. 2.82 was read to the jury as follows:

> In examining an expert witness, counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts, and to give an opinion based on that assumption.
>
> In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts.

(RT 449-50; CT 98).

because it doesn't require expert witness testimony to be proved beyond a reasonable doubt. (Petition, at 6(a).

Neither of these claims merit habeas relief. What must be proved beyond a reasonable doubt is a defendant's guilt of the elements of the charged crime, not the facts regarding any witness' credibility. *In re Winship*, 397 U.S. 358. The state courts reasonably denied this claim. 28 U.S.C. § 2254(d).

VI.

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation and (2) directing that the Petition be denied and dismissed with prejudice.

DATED: May 28, 2002

/s/ Jeffrey W. Johnson
JEFFREY W. JOHNSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
– WESTERN DIVISION

GEORGE A. CASILLAS, Petitioner, v. WARDEN, CALIFORNIA STATE PRISON AT AVENAL, Respondent.	No. SACV-01-120-GLT (JWJ) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jun. 26, 2002)

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the instant Petition along with the attached Report and Recommendation of the United States Magistrate Judge, and has made a *de novo* determination of the Report and Recommendation. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected.

IT IS ORDERED that a Judgment be issued denying the instant Petition and dismissing it with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this Order and the Judgment of this date on counsel for Petitioner and Respondent.

DATED: June 26, 2002

/s/ Gary L. Taylor
HONORABLE GARY L. TAYLOR
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
– WESTERN DIVISION

GEORGE A. CASILLAS, Petitioner, v. WARDEN, CALIFORNIA STATE PRISON AT AVENAL, Respondent.	No. SACV-01-120-GLT (JWJ) JUDGMENT (Filed Jun. 26, 2002)

Pursuant to the Order of the Court adopting the recommendations of the United States Magistrate Judge, and adopting the same as the facts and conclusions of law herein,

IT IS ADJUDGED that Judgment be entered denying the instant Petition and dismissing it with prejudice.

DATED: June 26, 2002

/s/ Gary L. Taylor
HONORABLE GARY L. TAYLOR
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE A. CASILLAS, Petitioner-Appellant, v. WARDEN, of the California State Prison at Avenal, California; et al., Respondents-Appellees.	No. 02-56444 D.C. No. CV-01-00120-GLT Central District of California, Santa Ana ORDER (Filed Nov. 20, 2003)

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Tallman and Rawlinson have voted to deny petition for rehearing en banc and Judge Noonan recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.